MOTION FILED
MAR 2 - 1987

No. 86-357

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF FOR THE CANADIAN TRUCKING ASSOCIATION AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF FOR THE CANADIAN TRUCKING ASSOCIATION AS AMICUS CURIAE

The Canadian Trucking Association ("CTA"), a federation of seven regional trucking associations,* requests leave to file the accompanying brief as *amicus curiae* in support of appellants, outside the time limits prescribed by Rule 36 of the Rules of this Court, to bring to the Court's attention the effect of discriminatory state highway tax laws, such as the Pennsylvania statutes at issue in this case, on motor carriers based in Canada.

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* The CTA's members are the Alberta Trucking Association, the Atlantic Provinces Trucking Association, the British Columbia Motor Transport Association, the Manitoba Trucking Association, the Ontario Trucking Association, the Saskatchewan Trucking Association, and the Trucking Association of Quebec Inc.

Rule 36.2 provides that an *amicus curiae* brief may be filed "within the time allowed for the filing of the brief of the party supported." The Court has previously recognized, however, that this timeliness requirement is not jurisdictional, and it has often granted leave to file out of time where good cause has been shown. See, *e.g.*, *Booth* v. *Maryland*, No. 86-5020 (Feb. 23 1987); *United States* v. *Salerno*, 107 S. Ct. 665 (1986); *Johnson* v. *Transp. Agency*, 107 S. Ct. 311 (1986); *Bowsher* v. *Synar*, 106 S. Ct. 1631 (1986); *International Union, United Automobile Workers* v. *Brock*, 106 S. Ct. 1487 (1986); *Arkansas* v. *Oklahoma*, 465 U.S. 1018 (1984) (granting motion of Commonwealth of Pennsylvania in case challenging discriminatory highway tax); and *Goldstein* v. *California*, 409 U.S. 976 (1972).

In *Goldstein*, for example, the *amicus curiae* trade association sought leave to file a brief out of time because "the direct impact of the case on [the business of its members] was not immediately apparent." Motion of Information Industry Association for Leave To File Brief *Amicus Curiae* at 3, *Goldstein* v. *California*, O.T. 1971, No. 71-1192. Here, too, the Canadian Trucking Association only became aware of this case and of its significance to the interests of the Canadian trucking industry on February 13, 1987. A poll of its members to participate was not concluded until February 25, 1987. Although the CTA monitors some legislative and administrative developments in the United States, it does not normally follow or take part in judicial proceedings in this country.

The CTA believes the attached *amicus curiae* brief will assist the Court in its consideration of this case. Appellants contend Pennsylvania's highway use taxes discriminate against interstate commerce, in violation of the Commerce Clause, because they impose special financial burdens on trucks registered out-of-state. Appellants have argued these burdens grant a competitive advan-

tage to in-state trucks, have a severe cumulative effect on trucks engaging in interstate rather than local commerce, and cause other jurisdictions to enact retaliatory legislation. As explained in the attached *amicus curiae* brief, these effects are particularly pronounced against Canadian motor carriers doing business in the United States.

By the same token, CTA does not believe appellees will be unfairly prejudiced if the brief is accepted for filing. The *amicus curiae* brief does not contain any legal arguments not presented by appellants. Its thrust is to illustrate the force of those arguments by specific reference to published data concerning Canadian truckers. Counsel for appellees was informed February 26, 1987, immediately after the CTA reached its decision to seek leave to file this brief. It has been provided with a typescript copy of this brief in advance of this motion's filing. Appellants have consented to the filing of this brief; appellees have not.

For the foregoing reasons, the motion of the Canadian Trucking Association for leave to file a brief *amicus curiae* in support of appellants should be granted.

Respectfully submitted.

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BRIEF FOR THE CANADIAN TRUCKING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

The Canadian Trucking Association ("CTA") is a federation of seven regional trucking associations in Canada: the Alberta Trucking Association, the Atlantic Provinces Trucking Association, the British Columbia Trucking Association, the Manitoba Trucking Association, the Ontario Trucking Association, the Saskatchewan Trucking Association, and the Trucking Association of Quebec Inc. These associations, through their membership, represent most of the for-hire trucking industry in

Canada, which consists of more than 50,000 trucks, 40,000 tractors and 60,000 trailers and employs some 90,000 Canadians. The CTA seeks to promote and further the interests of this industry by speaking for Canadian truckers provincially and nationally on policy issues and by following domestic government and industry developments in Canada and internationally in the United States and abroad.

The CTA includes within its constituency the vast majority of Canadian for-hire carriers transporting freight between the United States and Canada, but which engage in little or no interstate or intrastate trucking operations. These carriers have a strong interest in contesting the constitutionality of highway use tax statutes, such as the Pennsylvania marker fee and axle tax, because these statutes impose disproportionately heavy financial burdens on truckers, including Canadian trucking companies, whose business requires them to operate in more than one state. As explained below, the Pennsylvania taxes are particularly harmful to Canadian carriers. Canada and the United States conduct the world's largest volume of bilateral trade. Indeed, trade between the United States and the Province of Ontario alone exceeds that between the United States and Japan. A significant amount of this United States-Canada overland international trade moves by truck. Nearly two-thirds of all Canadian imports to and a similar volume of imports from the United States are delivered to and originate in, respectively, Ontario and Quebec. Pennsylvania's highways serve as a principal route for this trade.

SUMMARY OF ARGUMENT

Appellants contend Pennsylvania's highway use taxes discriminate against interstate commerce, in violation of the Commerce Clause, because they impose special financial burdens on trucks registered outside the State. These burdens grant a competitive advantage to in-state trucks,

have a severe cumulative effect on trucks engaged in interstate, not local commerce, and prompt other jurisdictions to enact retaliatory legislation. *Amicus curiae* CTA agrees with appellants' position. These effects are especially pronounced on Canadian motor carriers transporting freight between the United States and Canada.

Most international road traffic to or from the United States consists of movements to customers in Northern and Eastern regions of the country. Those movements do not normally entail domestic United States service or shipments because United States customs and immigration requirements render such local operations infeasible. Since these are regions in which most of the non-proportional highway tax states are located and since Pennsylvania in particular occupies a key location requiring traversal by most Canadian trucks delivering or picking up goods in the United States, Canadian motor carriers are frequent victims of the discrimination worked by highway taxes not apportioned to road use. Such motor carriers serve primarily domestic Canadian customers. Consequently, their participation in export or import traffic involving the United States is often at irregular intervals and at substantially lower frequency than domestic Canadian commerce. Canada and its Provinces do not now impose such discriminatory taxes on United States motor carriers doing business in Canada. If Canada or any one of its Provinces were compelled to retaliate, this Court would be powerless to eliminate the harmful effects on commerce.

This Court has noted that state restrictions burdening foreign commerce must be subjected to searching scrutiny. Given the discrimination against Canadian trucking companies inherent in non-proportional state highway use taxes, the Pennsylvania axle tax and marker fee cannot survive that scrutiny.

ARGUMENT

I. PENNSYLVANIA'S MARKER FEE AND AXLE TAX DISCRIMINATE AGAINST INTERSTATE AND FOREIGN COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

A. Pennsylvania's Non-proportional Highway Use Taxes Impermissibly Discriminate Against Interstate and Foreign Commerce

This case challenges the constitutionality of two taxes, the marker fee, 75 Pa. Cons. Stat. Ann. § 2102 (Purdon 1981), and the axle tax, 75 Pa. Cons. Stat. Ann. §§ 9901 *et seq.*, imposed on motor carriers by the Commonwealth of Pennsylvania as a condition of operating on its highways.

Appellants have attacked both statutes under the Commerce Clause of the United States Constitution. They contend the axle tax discriminates against out-of-state motor carriers because, as a result of the contemporaneous reduction in Pennsylvania's registration fees, it effectively applies solely to vehicles registered outside Pennsylvania. Appellants also contend the marker fee and the axle tax, even if deemed to be paid by both in-state and out-of-state trucks, discriminate in their application against non-Pennsylvania-based carriers because they impose flat charges that do not vary with the amount of use made of the State's highways. Pennsylvania trucks thus pay far lower highway use taxes. As a result, both statutes violate the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), because they have a discriminatory impact on interstate commerce and are not fairly related to the services provided by the State.

Amicus curiae CTA fully concurs in and adopts appellants' legal analysis, demonstrating why statutes such as the marker fee and the axle tax impose a disproportionate burden on carriers based outside Pennsylvania.

CTA submits that this burden is not limited to carriers based in other states; the vast majority of carriers registered in Canada and doing business in the United States suffer an identical or greater burden. Non-proportional, regressive highway use taxes, for geographical and other reasons, fall with particular harshness on the Canadian trucking industry.

B. Pennsylvania's Non-proportional Highway Use Taxes Impose Especially Harsh Burdens on Canadian Truckers Doing Business Between the United States and Canada

Appellants have presented three principal reasons why Pennsylvania's marker fee and axle tax are precisely the sort of discriminatory levies the Commerce Clause is designed to prohibit. First, they discriminate against out-of-state trucks, which make far less use of Pennsylvania's highways, by subjecting them to higher average per-mile tax costs. Second, they inhibit the flow of interstate commerce by imposing substantial cumulative burdens on motor carriers that do business in several states. Third, they provoke retaliatory legislation by states whose truckers suffer this discrimination. These adverse effects are especially pronounced in the case of Canadian trucking companies which are engaged only a part of their time in receiving or delivering such foreign commerce goods in the United States.

Canada is a major exporter of goods to the United States. Because virtually all of Canada's principal cities are within 100 miles of the United States border (see App. A., *infra*, 1a), at least half of these goods are transported by truck. In 1984, the Canadian carriers classified as international carriers, *i.e.*, carriers that made at least one for-hire trip out of Canada, operated a total fleet of 72,441 pieces of motor vehicle equipment. See Statistics Canada, *Trucking in Canada, 1984* (Cat.

53-222).[1] Moreover, nearly two-thirds (65.5%) of all Canadian domestic exports to the United States were delivered to two regions, the north central and mid-Atlantic states, that border the major industrialized provinces of Canada, Ontario and Quebec. See App. B, *infra*, 2a.[2] Climate and other considerations cause much of this traffic to move on an occasional or seasonal basis.

These unique characteristics of the Canadian trucking industry mean that Canadian motors carriers are particularly susceptible to the harm appellants describe. Canadian-based trucks, because they are registered in and operated on many routes wholly within Canada, are likely to travel even fewer miles on Pennsylvania's highways than do their typical United States counterparts that are registered in states other than Pennslyvania. Consequently, the axle tax and marker fee impose on them an even higher average tax cost per mile. Furthermore, as the map attached as Appendix B illustrates, the trucks of most Canadian carriers engaged in international hauls are required to traverse Pennsylvania at one time or another, by virtue of that State's central location to the principal customers of Canadian markets. A great many Canadian truckers must, therefore, pay Pennsylvania's non-proportional highway use taxes even though they may make little total use of that State's roads. This result is especially harsh for Canadian fleet owners. They are likely to use only a small number of their vehicles for international operations (but may not know in advance which vehicles will be used).[3] The result is also harsh for the many Canadian carriers whose United States

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[1] Unless otherwise indicated, the data in this brief come from the Statistics Canada study.

[2] The red areas on Appendix B map represent the states that impose discriminatory flat highway taxes.

[3] Carriers attempting to reduce their liability by limiting the number of fleet vehicles for which the taxes are paid suffer substantial inflexibility in their international operations.

markets are seasonal. They have no reason to enter the United States during large portions of the year.

In addition, Canadian motor carriers face an enhanced risk of cumulative taxation. As noted, most Canadian exports and imports are delivered to or picked up from states in the northern and eastern United States;[4] unfortunately, the states with non-proportional highway use taxes are bunched in these two regions. See App. B, *infra*, 2a. For example, a motor carrier from Quebec delivering goods to a customer in Virginia would, it appears, have to traverse the highways of Vermont, Pennsylvania, New Jersey, and Maryland, all of which impose discriminatory highway use taxes. That Canadian trucker would be required to pay each of these states the same amount of tax for several trips that an in-state motor carrier would pay for the use of the highways for an entire year. Undoubtedly, other dramatic examples of discrimination against the Canadian-based trucking industry occur on a daily basis.

Finally, it is possible the proliferation of discriminatory highway use taxes such as the Pennsylvania marker fee and axle tax may compel Canadian provinces or the national government to retaliate against United States carriers based in nonproportional tax states—or, perhaps, against United States carriers generally. *See, Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450 (1979).[5] United States-based motor carriers operating

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[4] Approximately 2000 Canadian trucks cross the border into the United States daily.

[5] United States-based motor carriers do substantial business in Canada. In 1984, for example, there were 1,226,868 entries into Canada by commercial vehicles domiciled in the United States. Statistics Canada Catalogue 66-001 (Exhibit 2). In addition, from January 1984 to June 1986 a total of 1,476 additional United States carriers filed and were granted (in whole or in part) applications with provincial transport boards, receiving operating rights in Canada.

in Canada currently pay at most three types of highway use taxes: fuel taxes for fuel purchased in Canada; registration fees in British Columbia and Alberta (proportioned pursuant to the International Registration Plan); and special permit fees for overweight or overdimensional loads (as may be required in particular provinces). Neither Canada nor any of its provinces has a non-proportional highway use tax similar to the Pennsylvania axle tax or marker fee. Unlike the situation with retaliatory taxes enacted by other states (see ATA Br. 38), however, this Court is powerless to prevent Canada or one of its Provinces from imposing special highway taxes on trucks based in the United States, despite the serious impact such retaliation could have on trade between the two nations. *See, Japan Line*, 441 U.S. at 450.

In sum, the evils attributable to Pennsylvania's non-proportional highway use taxes apply with special force to Canadian-based motor carriers. This Court has frequently noted that "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" under the Commerce Clause. *South-Central Timber Dev.* v. *Wunnicke*, 467 U.S. 82, 100 (1984) (plurality opinion). *See also, Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.9 (1980); and *Japan Line*, 441 U.S. at 446. Accordingly, this Court should declare the Pennsylvania highway use statutes unconstitutional. While the CTA and its members have no objection to paying their fair share of the State's highway expenses, the discriminatory marker fee and axle tax exact an unfair price out of all proportion to highway construction or maintenance needs attributable to operations by Canadian trucking companies.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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